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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 71-37

GLADYS T. GEIGER,

Petitioner,

vs.

COMMISSIONER OF
INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari
Directed to the United States Court of Appeals
for the Ninth Circuit

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TO THE HONORABLE WARREN BERGER, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Your petitioner, Gladys T. Geiger, respectfully petitions this Honorable Court for a writ of

certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse a judgment affirming a tax deficiency.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, U.S. Codes, and Rule 21, Rules of the United States Supreme Court.

The decision of the Tax Court, rendered on October 3, 1969 (I.R. 155) was appealed to the Court of Appeals for the Ninth Circuit under the provisions of Section 7482 of the Internal Revenue Code of 1954.

The Court of Appeals for the Ninth Circuit rendered its judgment on April 7, 1971, a copy of which is attached hereto as Appendix A and made a part hereof.

OPINION BELOW

The memorandum finding of facts and the opinion of the Tax Court are unofficially reported at 28 TCM Section 795.

A copy of the opinion of the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix A and made a part hereof.

THE FACTS

The material facts are as follows:

The taxpayer is a prominent attorney in Los Angeles, California, engaged principally in the practice of criminal law under the name of Gladys Towles Root (I. R. 136).

For two years an auditor of the Internal Revenue Service was given full access of her books and records and accounts. A dispute arose over whether she had to give the names of clients for whose expenditures she kept a record but without the name of the party except for an initial (because of the nature of her business).

Following this dispute an audit of the taxpayer's returns was made in her offices with full disclosure and full access to her records, but the Commissioner arbitrarily disallowed part of the taxpayer's claimed business expenses and charitable contribution deductions for the years 1959, 1960 and 1961.

The deductions asserted by the taxpayer and disallowed and allowed are as follows:

1959

Item	Deduction Claimed	Disallowed	Allowed
Client Costs	$39,795.80	$23,816.80	$15,979.00
Promotion & Entertainment	17,300.64	17,300.64	0.
Automobile Expenses	4,971.43	357.05	4,614.38
Telephone	6,671.15	1,663.33	5,007.82
Office Expenses	7,591.02	1,053.73	6,537.29
Contributions	432.00	432.00	0.
	$76,762.04	$44,623.55	$32,138.49

1960

Client Costs	$23,787.71	$12,530.93	$11,256.78
Promotion & Entertainment	10,011.33	10,011.33	0.
Automobile Expenses	2,768.24	200.55	2,567.69
Telephone	7,479.67	1,594.70	5,884.97
Office Expenses	11,496.65	76.75	11,419.90
Business Use of Residence	3,821.98	3,821.98	0.
Investigative Expenses	17,032.00	17,032.00	0.
Travel Expenses	2,020.55	499.58	1,520.97
Contributions	612.00	202.00	410.00
	$79,030.13	$45,969.82	$33,060.31

1961

Item	Deduction Claimed	Disallowed	Allowed
Client Costs	$31,208.58	$23,099.25	$ 8,109.33
Promotion & Entertainment	8,286.87	8,286.87	0.
Automobile Expenses	3,886.23	294.40	3,591.83
Telephone	7,538.46	1,627.96	5,910.50
Office Expenses	7,853.94	391.33	7,462.61
Business Use of Residence	4,588.81	4,588.81	0.
Travel Expenses	1,263.16	358.20	904.96
Christmas Expense	2,065.25	310.00	1,755.25
Gifts and Flowers	453.65	453.65	0.
Contributions	667.85	527.85	140.00
	$67,812.80	$39,938.32	$27,874.48

At the trial, the taxpayer took the witness stand and testified fully regarding the arbitrary disallowances and testified that her returns, to the best of her knowledge and belief, were correct.

Since the audit in this case, the Tax Court has changed from an administrative court to a constitutional court and we think, therefore, that the law applicable should be similar to the law governining the United States District Courts in connection with the burden of proof and who has the duty of going forward in any case in a

constitutional court.

The only witness in this case was the taxpayer and her accountant. No effort was made by the government accountant or government witnesses to dispute or rebut her testimony.

While an administrative court may set up its rules as to how it will weigh and consider the evidence, we think that a constitutionally conducted court has the duty of going forward with the burden of proof and if it does not go forward, the testimony stands on the uncontroverted evidence of the sole witnesses in the case.

QUESTIONS PRESENTED

1. Whether the Tax Court, now being a constitutional court, is bound to follow the rules of procedure and the rules of evidence governing constitutional courts and whether it entitles the taxpayer to a trial by jury, as provided in the Sixth Amendment to the Constitution of the United States.

2. Whether the Tax Court, now being a constitutional court, is governed by the presumption that a witness speaks the truth and that the testimony of a witness overcomes the presumption of the Commissioner (who does not testify and whose agents do not testify or are subject to cross-examination), the same as any other civil case.

3. Whether the disallowances by the Commissioner are special, partial and arbitrary and therefore in violation of due process of law guaranteed by the Fifth Amendment and a denial of the right of confrontation as guaranteed by the Sixth Amendment.

4. Whether the total denial of promotion and entertainment expenses for the three years involved was arbitrary and capricious and unconstitutional.

5. Whether the disallowances of telephone expense of $5,007.82 in 1959, $5,884.97 in 1960 and $5,910.50 in 1961 were special, partial and arbitrary.

6. Whether the total disallowance of the business use of her residence was erroneous.

7. Whether the total disallowance of gifts and flowers was erroneous.

8. Whether the total disallowance of investigative expenses was erroneous.

9. Whether each of the items mentioned were presumptively correct unless established to be incorrect by the government.

10. Whether it is error in a constitutionally established court to shift the burden of proof to the taxpayer.

11. Mrs. Root, as she is popularly known, is known for her glamorous promotion and entertainment at her offices and at her home,

yet there was total disallowance of these expenditures, as there was of other principal expenditures, as shown by the deductions claimed, disallowed and allowed.

12. Whether the courts, in trying a tax case, must follow Erie v. Tompkins, 304 U.S. 64, 82 L.ed. 1188, and apply the law of the state where the trial is being held.

13. Whether a tax case attempting to assess a deficiency becomes a case in controversy within the meaning of Article 3, Sections 1 and 2 of the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

In Leary v. U.S., 395 U.S. 6, 23 L.ed. 2d 57, the Court said that a statutory presumption cannot be sustained if there is no rational connection between the facts proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

Where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature (or court) to create it as a rule governing the procedure of courts.

See also:

Mobile, J. & K. C. R. Co. v. Turnipseed,
219 U. S. 43, 55 L. ed. 80, 31 S. Ct. 136, 32 LRA (NS) 226, Ann Cas 1912A 463, 2 NCCA 243;

Bailey v. Alabama,
219 U. S. 239, 55 L. ed. 200, 31 S. Ct. 145;

Lindsley v. Natural Carbonic Gas Co.,
220 U. S. 61, 81, 55 L. ed. 369, 378, 31 S. Ct. 337, Ann Cas 1912C 160;

Luria v. United States,
231 U. S. 25, 58 L. ed. 106, 34 S. Ct. 10;

McFarland v. American Sugar Ref. Co.,
241 U. S. 79, 86, 60 L. ed. 899, 904, 36 S. Ct. 498;

Manley v. Georgia,
279 U. S. 1, 73 L. ed. 575, 49 S. Ct. 215;

Western & A. R. Co. v. Henderson,
279 U. S. 639, 642, 73 L. ed. 884, 887, 49 S. Ct. 445;

Morrison v. California,
291 U. S. 82, 90, 78 L. ed. 664, 670, 54 S. Ct. 281.

In Tot v. U.S., 319 U.S. 463, 87 L.ed. 1519, the Court held that a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. The Tot case held that presumption therein unconstitutional.

In U.S. v. Gainey, 380 U.S. 63, 13 L.ed. 2d 658 (also U.S. v. Romano, 382 U.S. 136, 15 L.ed. 2d 210) the Court held that the presumption in illegal still cases that the mere presence of a defendant was carrying on the business of a distiller "unless the defendant explains such presence to the satisfaction of the jury" is unconstitutional. 26 U.S. Codes 5601 (a) 4; 5601 (b) 2.

Like Tot v. U.S., the inference in that case was held to be arbitrary.

In California, former statutes classified presumptions as a form of indirect evidence and stated that unless a presumption was controverted the jury had to find according to the presumption. Under these statutes the rule became established that presumptions constituted independent evidence, to be somehow weighed against other evidence, and that a verdict or finding could rest upon a presumption although all the other evidence was opposed to it. The leading case in California declaring this rule was Smellie v. So. Pacific (1931), 212 Cal. 540, 549.

The California view of the evidentiary effect of presumptions was opposed in strong dissenting opinions and law review articles. (See: Witkin, California Evidence (2d ed.), p. 194.)

The comment to Evidence Code of the State of California, Section 600, summarizes the objections to the Smellie line of cases as follows: These decisions require the jury to perform an intellectually impossible task. The jury is required to weigh the testimony of witnesses and other evidence as to the circumstances of a particular event against the fact that the law requires an opposing conclusion in the absence of contrary evidence and to determine which evidence is of greater probative force (p. 195).

Under the Evidence Code in California, it is held that "A presumption is not evidence" (Evidence Code, Section 600 (a)).

We respectfully submit that California must follow the doctrine of Erie v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, and that the burden of proof now no longer shifts to the taxpayer but belongs to the taxing authorities and since a witness is presumed to speak the truth, the court may not arbitrarily reject the taxpayer's testimony.

The Tax Court as an administrative court has engaged in an unconstitutional assumption of powers to make the finding of the Commissioner, who perhaps never sees the taxpayer and arbitrarily and capriciously makes

a finding of fact subject to no cross-examination and subject to no confrontation which the taxpayer is entitled to have to reach at the truth. In carrying out its court in this way, the Tax Court has invaded the rights of taxpayers in an unconstitutional manner and since the Tax Court has now become a constitutional court, there should be no hesitation in correcting this procedure.

See: Erie v. Tompkins, 304 U.S. 64, 92.

Federal courts have been broadly divided into constitutional and legislative courts. The power of Congress to create inferior courts and invest them with jurisdiction as constitutional courts is established under the specific power given in Section 2 of Article 3 of the Constitution. They are called constitutional courts. (Old Colony Trust Co. v. Comm. of Int. Rev., 279 U.S. 716, 731, 73 L. ed. 918; Ex Parte Bakelite Corp., 279 U.S. 789; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 7 L. ed. 243, Fed. Cas. No. 302.)

CONCLUSION

WHEREFORE, petitioner Gladys T. Geiger prays for writ of certiorari to the

United States Court of Appeals for the Ninth Circuit and reversal of the judgment below.

Respectfully submitted,

MORRIS LAVINE

Attorney for Petitioner

APPENDIX A

Filed
April 7, 1971
Wm. B. Luck, Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLADYS T. GEIGER, Appellant,	)	No. 25214
vs.	)	
COMMISSIONER OF INTERNAL REVENUE, Appellee.	)	

On Appeal from the Decision of the United States Tax Court

Before: KOELSCH and CARTER, Circuit Judges, and BYRNE, District Judge.*

* Honorable William M. Byrne, United States District Judge, Los Angeles, California, sitting by designation.

PER CURIAM:

The Commissioner of Internal Revenue determined deficiencies in the income tax returns of Gladys Geiger for the years 1959, 1960 and 1961. The Tax Court affirmed and Geiger has appealed.

The Commissioner's determination was presumptively correct. Herbert v. Commissioner, 377 F.2d 65 (9th Cir. 1967). The burden rested upon the taxpayer to prove that she was entitled to business expense deductions in excess of those allowed by the Commissioner and that moneys she had received but had not reported were not taxable as income.

The taxpayer's evidence, however, consisted principally of her own testimony that the deductions she had claimed were correct and that the unreported amounts were not taxable to her in their entirety. She offered no business records, checks or receipts to prove that the sums claimed as deductions were actually spent and no documentary evidence to substantiate that any claimed expenditures were for a business purpose. Nor did she offer any explanation as to why she had not reported the moneys she admitted receiving.[1/]

1/ In addition to her own testimony, the taxpayer introduced the testimony of a tax accountant who prepared her tax returns for the years 1960 and 1961. He testified that he prepared the returns from the books and records the taxpayer furnished him and that he had no personal knowledge of any expenditures made by her. None of

Geiger now maintains that her uncontradicted testimony, plus that of her accountant, sustained her burden and rebutted the presumption. However, evidence adduced by a taxpayer, even though uncontradicted, does not necessarily operate to overcome the presumption in favor of the Commissioner. Sharwell v. Commissioner, 419 F.2d 1057 (6th Cir. 1969); 9 Martons, Law of Federal Income Taxation, § 50.61 (1965). At most it raises a factual issue. Wood v. Commissioner, 338 F.2d 602 (9th Cir. 1964). Here the Tax Court resolved that issue against the taxpayer. It concluded that the taxpayer's evidence was "so general and of such summary nature that we conclude for all three years in issue she has failed to sustain her burden of proof."

We are satisfied from our review of the entire record that the Tax Court's appraisal of the evidence, far from being "clearly erroneous," was fully warranted and that its judgment should be affirmed.

IT IS SO ORDERED.

1/ (Continued)

the books and records assertedly furnished him were produced. The Tax Court found that his testimony "adds nothing."